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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 311

MORRIS LIPSITZ and MORRIS LIPSITZ and HELEN LIPSITZ, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction (and App., infra p. 1)	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	24

Citations

Cases:

Belridge Oil Co. v. Commissioner (CA 9) 85 F. (2d) 762 — 21

Boggs & Buell v. Commissioner (CA 3) 23 F. (2d) 859 — 21

Bour v. Commissioner, 23 T.C. No. 35 — 15

Bonwitt Teller & Co. v. Commissioner (CA 2) 53 F. (2d) 381 — 21, 22

Brell v. Brell, 143 Md. 443, 122 Atl. 635 — 11

Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060 — 11, 12, 16

Buena Vista Land & Dev. Co. v. Lucas (CA 9), 41 F. (2d) 131 — 21

Citrus Soap Co. v. Commissioner (CA 9), 42 F. (2d) 372 — 21

Commissioner v. Hart (CA 6), 76 F. (2d) 864, affirming 27 B.T.A. 528 — 15

Conrad & Co. v. Commissioner (CA 1), 50 F. (2d) 573 — 21

Dempster Mill Mfg. Co. v. Burnet (Ct. of App., D.C.) 46 F. (2d) 604 — 22

Durkee v. Commissioner (CA 6), 162 F. (2d) 184, 187 — 20

Goodell v. Koch, 282 U.S. 118, 51 S. Ct. 62 — 3, 7, 8

Holland v. United States, 348 U.S. 121 — 16, 18, 19

Hopkins v. Bacon, 282 U.S. 122, 51 S. Ct. 62 — 3, 7, 8

Immaculata Gallagher v. Smith (CA 3) Para. 9485 Commerce Clearing House Federal Tax Service, 1955 — 16, 20

Kingman & Co. v. Western Mfg. Co., 170 U.S. 675, 18 S. Ct. 786 — 2

PAGE

Masterman v. Masterman, 129 Md. 167, 98 Atl. 537 ..... 10, 11, 12, 16
Marcella v. Commissioner (June 1, 1955) Para. 72,743 Prentice-Hall Federal Taxes, 1955 (CA 8) 18, 19
Nichols v. Commissioner (CA 3), 44 F. (2d) 157 ..... 21, 22
Pflegher Hardware Specialty v. Blair (CA 2), 30 F. (2d) 10 22
Pittsburgh Hotel Co. v. Commissioner (CA 3), 43 F. (2d) 345 21
Pittsburgh Hotel Co. v. Commissioner (CA 3), 43 F. (2d) 859 21
Planters Operating Co. v. Commissioner (CA 8), 55 F. (2d) 583 ..... 21, 22
Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 62 ..... 3, 7, 8, 9, 13
Rockwood Pottery Co. v. Commissioner (CA 6), 45 F. (2d) 43 21
Royal Packing Co. v. Commissioner (CA 9), 22 F. (2d) 536 21
Saulsbury v. Commissioner, 27 B.T.A. 744 15
Smith v. United States, 348 U.S. 147 ..... 16, 18
Taylor v. Commissioner, 293 U.S. 507, affirming 70 F. 2d) 619 (CA 2) 19, 20
Thomas et al. v. Commissioner (June 14, 1955), Para. 72,773 Prentice-Hall Federal Taxes, 1955 (CA 6) 17, 19, 20
United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254 2
United States v. Ellicott, 223 U.S. 524, 32 S. Ct. 254 2
United States v. Malcolm, 282 U.S. 792, 51 St. Ct. 184 ..... 3, 7, 8
Whitelock v. Whitelock, 156 Md. 115, 143 Atl. 712 10

Rulings:
I.T. 1670, Internal Revenue Cumulative Bulletin II-1, January-June, 1923, p. 146 15

Text Books:
Prentice-Hall "Federal Taxes" 1955 Edition, Vol. I, Para. 7211, at page 7170 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 12, 1955 (App. infra, p. 8 R. 159), based on an opinion of said Court promulgated April 12, 1955 (App., infra, p. 1, R. 151) affirming the decisions of the Tax Court of the United States entered July 15, 1954 (R. 33). Said judgment of the Court of Appeals became a final judgment of that Court on May 18, 1955, when the Court denied the petition for rehearing filed on May 11, 1955 by these petitioners (App., infra, p. 10, R. 184).

OPINIONS BELOW

The Findings of Fact and Opinion of the Tax Court of the United States promulgated March 18, 1954 (R. 2) is reported in 21 T.C. 917.

The opinion of the Court of Appeals, promulgated April 12, 1955 (App., infra, p. 1, R. 151) affirming the decisions of the Tax Court entered July 15, 1954 is reported in 220 F. (2d) 871.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, 220 F.(2d) 871 (App., infra, p. 1, R. 151) was promulgated April 12, 1955. The judgment of the Court of Appeals was entered April 12, 1955 (App., infra, p. 8, R. 159).

On May 11, 1955, petitioners filed with the Court below a petition for rehearing. Motion for a stay of mandate was filed on May 12, 1955. On May 13, 1955, the Court of Appeals entered its order staying mandate pending the action of the Court on the petition for rehearing (App., infra, p. 9, R. 184).

On May 18, 1955 the Court below entered its order denying the petition for rehearing (App., infra, p. 10, R. 184).

The judgment of the Court below did not become final, so that certiorari could be sought as to the same, until May 18, 1955 when the United States Court of Appeals for the Fourth Circuit denied petitioners' motion for rehearing. *United States* v. *Ellicott*, 223 U.S. 524, 32 S. Ct. 334; *United States* v. *Cresent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U.S. 675, 680, 681, 18 S. Ct. 786.

QUESTIONS PRESENTED

1. Whether all the income from properties, owned by petitioners (husband and wife) as tenants by the entirety in the State of Maryland, is taxable to the husband for Federal income tax purposes.

2. Whether the Court below erred by failing to follow the law of the State of Maryland and the decisions of this Court in *Poe* v. *Seaborn,* 282 U.S. 101, 51 S. Ct. 58; *Goodell* v. *Koch,* 282 U.S. 118, 51 S. Ct. 62; *Hopkins* v. *Bacon,* 282 U.S. 122, 51 S. Ct. 62; and *United States* v. *Malcolm,* 282 U.S. 792, 51 S. Ct. 184 by deciding in this case that all of the income from properties owned by petitioners as tenants by the entirety in the State of Maryland is taxable to the husband, Morris Lipsitz.

3. Was petitioner, Morris Lipsitz, taxable only on one-half of the income from the properties owned by him and his wife as tenants by the entirety in the State of Maryland?

4. Did the Court below err in sustaining deficiencies against Petitioner Morris Lipsitz based upon a net worth statement that included property and computed income belonging to petitioner's wife and also omitted valuable property which respondent's agent admitted he failed to include at the crucial beginning point of the net worth statement?

5. Whether the Court below erred by affirming the Tax Court of the United States in totally disregarding the testimony of petitioners' expert witnesses and reaching an "independent conclusion of its own" as to the fair market value of an ice plant owned by petitioners as of June 30, 1937.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 21. NET INCOME.

(a) Definition—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

ARTICLE 45—SECTION 4 ANNOTATED CODE OF MARYLAND (FLACK) 1951:

Married women shall hold all their property of every description for their separate use, as fully as if they were unmarried, and shall have all the power to dispose of by deed, mortgage, lease, will or any other instruments that husbands have to dispose of their property, and no more.

STATEMENT OF THE CASE

The petitioners are husband and wife and during the years here involved resided at 4201 Fernhill Avenue, Baltimore, Maryland. The husband, Morris Lipsitz, filed separate individual Federal income tax returns for the years 1938, 1939, 1940, 1941 and 1944. For the years 1942, 1943 and 1945, the petitioners filed joint returns.

As found by the Court below, the petitioners owned in the State of Maryland a substantial amount of property as tenants by the entirety. In determining against the petitioner Morris Lipsitz deficiencies in Federal income tax for the years 1938, 1939, 1940, 1941 and 1944, the Tax Court of the United States held that all the income from assets owned by the petitioners, husband and wife, as tenants by the entirety, was taxable in toto to the husband, Morris Lipsitz. The Court of Appeals affirmed this decision of the Tax Court (App., infra, p. 8, R. 158).

The income from the properties owned by petitioners as tenants by the entirety was computed by the Commissioner on the net worth basis and so determined by the Tax Court.

During the year 1941, the petitioners sold to the Merchants Terminal Company of Baltimore, Maryland ice plant properties known as the Warner Ice Company for $57,500. Petitioners reported no income from this transaction contending that they had sustained a loss. The Tax Court determined, however, that they had derived a capital gain of $17,357.49. (Findings of Fact of Court below, App., infra, p. 4, R. 154).

The test in determining whether there was a gain or loss from the transaction was the cost basis of the properties sold. All parties agreed that the selling price was $57,500. The crucial question in determining the cost basis of the properties was their fair market value as of June 30, 1937. The Tax Court found a fair market value of the properties at this basic date of $36,000. (Findings of Court below, App., infra, p. 5, R. 155). The Court below affirmed.

A distinguished array of disinterested experts testified for petitioners as to the fair market value of these assets as of June, 1937. The Tax Court itself found that these

experts were disinterested and reputable. (R. 28).

The petitioners' experts were as follows:

Allen Kenny, Superintendent of Manufacturing for the American Ice Company, Baltimore, Maryland and Washington, D. C. and formerly Chief Operating Engineer for the American Ice Company (R. 87).

Walter C. Hanneman of Waltham Welding Works (R. 136).

John M. Lambert of York Corporation, York, Pennsylvania. He had been erecting engineer, estimator, design engineer, branch manager and, at the time of testifying, was Divisional Manager of that corporation (R. 140).

William B. Spencer, Chief Engineer of Consolidated Engineering Company (R. 146).

Norman Mack of Millicent Construction Company

Honorable Norris O. Burgee, Appraiser for the City of Baltimore (R. 80).

The lowest fair market value for the plant and machinery of the corporation as given by the experts was $75,000.

The testimony of these experts was not rebutted by the Commissioner who offered no evidence as to the fair market value of the properties on June 30, 1937. The Tax Court ignored the testimony of the experts and reached an unexplained independent conclusion of its own that the fair market value as of June 30, 1937 was $36,000 (R. 12).

In affirming the Tax Court, the Court below also totally ignored the testimony of the petitioners' expert witnesses as to the fair market value of the properties on

June 30, 1937 and failed to mention this evidence in its opinion (App., infra, pp. 1-8).

The opinion of the Court of Appeals was promulgated on April 12, 1955 (App., infra, p. 1). The Court's judgment was entered on April 12, 1955 (App., infra, p. 8).

On May 11, 1955, petitioners filed with the Court below a petition for rehearing and on May 12, 1955 a motion for stay of mandate.

On May 13, 1955 the Court of Appeals entered an order staying mandate, pending the action of the Court on the petition for rehearing (App., infra, p. 9, R. 184).

On May 18, 1955, the Court of Appeals entered its order denying the petition for rehearing (App., infra, p. 10, R. 184).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals involves a substantial question of Federal tax law, particularly important to citizens domiciled in the State of Maryland. We respectfully urge that this Court should exercise its power of supervision and protect the property rights of those domiciled in Maryland with respect to taxation by the Federal Government as in the past this Court has preserved under similar circumstances the property rights of the residents of the States of Washington, Arizona, Texas and California in *Poe* v. *Seaborn*, 282 U.S. 101, 51 S. Ct. 58; *Goodel* v. *Koch*, 282 U.S. 118, 51 S. Ct. 62; *Hopkins* v. *Bacon*, 282 U.S. 122, 51 S. Ct. 62 and *United States* v. *Malcolm*, 282 U.S. 792, 51 S. Ct. 184.

In the cases named above, this Court held that husbands and wives domiciled in the States named above are entitled to file separate returns in which each may return

one-half of the income from property known as "community property" in those States.

We think that the decision of the Court below does not follow and is contrary to the decisions of this Court in *Poe* v. *Seaborn*, supra, *Goodel* v. *Koch*, supra, *Hopkins* v. *Bacon*, supra and *United States* v. *Malcolm*, supra, in holding and deciding that Morris Lipsitz, the husband, was required to report in his separate income tax returns filed for the years 1938, 1939, 1940, 1941 and 1944 *all the income* from the properties owned by himself and wife as tenants by the entirety under the law of the State of Maryland. The Court of Appeals said (App. infra p. 2):

• • • •

"• • • The record before us shows that during the years 1938 through 1944 Lipsitz and his wife owned a substantial amount of property as tenants by the entirety. In determining deficiencies against Lipsitz for the years in which he filed individual returns, the Tax Court treated all income earned on assets owned by Lipsitz and his wife as being taxable to Lipsitz. Lipsitz now contends that he should have been taxed upon only half the income from property owned by him and his wife as tenants by the entirety.

"It is well settled that the measure of title, and the rights thereto incident, in property held by husband and wife under a tenancy by the entirety, are to be determined here by the law of Maryland. And under that law, each spouse, husband and wife, is ordinarily entitled each to one-half of the income from such property. *Masterson* v. *Masterson*, 129 Md. 167, 98 Atl. 537. • • •"

• • • •

The Court then held that this case constituted an exception to the general rule because the husband controlled the management of the properties and that there was a clear agreement, followed by long continued practice that the income from the properties held by the husband and wife as tenants by the entirety, should be con

sidered in all respects as the income of the husband. The Court said with respect to the control of the properties by the husband (App., infra, p. 3, R. 153):

* * * *

"* * * He completely controlled the properties, made all decisions as to the purchase and sale of the properties. Indeed, Mrs. Lipsitz had so little connection with these properties that she failed to appear at the lengthy trial before the Tax Court. In reality, it was the husband who actually earned this income. There is nothing in the record to indicate that Mrs. Lipsitz either paid any commission to her husband for her share of the rentals collected or compensated him for his labor, materials and business acumen in the premises."

* * * *

This was the same argument that was made by the Government in *Poe* v. *Seaborn*, supra. The point was overruled by this Court in *Poe* v. *Seaborn*, supra, as follows:

* * * *

"The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

"The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers,

by no means negatives the wife's present interest as a co-owner.

"We are of the opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."

• • • •

That the Court below misinterpreted the law of the State of Maryland with respect to "control" and "management" by the husband is demonstrated by the decision of the Maryland Court of Appeals in *Whitelock* v. *Whitelock*, 156 Md. 115, 143 Atl. 712, involving not only the principal sum of a mortgage, all of which was being claimed by the husband and one-half by the wife, but accumulated interest thereon. The court stated the prevailing law in this way:

• • • •

"At common law, the appellant, by virtue of his control of the wife's property, would have been entitled to all of the income. As affected by statute, however, from time to time, the control of the husband over the wife's property has changed, until now, under the Married Women's Property Acts (Code Pub. Gen. Laws 1924, art. 45, Sections 1-21) in this state the wife shares equally with the husband in the income from a tenancy by the entireties. The authority for this statement is *Masterman* v. *Masterman*, 129 Md. 167, 98 A. 537, in which the history of tenancy by the entireties, with the changes wrought by statute in the respective rights of husband and wife therein, have been so exhaustively treated in the opinion of Chief Judge Boyd that a discussion of the subject here would involve nothing but needless repetition. *Furstenburg* v. *Furstenberg*, 152 Md. 247, 136 A. 534, 35 A.L.R. 151."

• • • •

In *Masterman* v. *Masterman*, 129 Md. 167; 98 Atl. 537, the Court of Appeals for the State of Maryland held that

in Maryland a judgment is not good against the property of husband and wife for the debt of the husband.

The Court, in *Masterman* v. *Masterman*, cited *Brewer* v. *Bowersox*, 92 Md. 567, 48 Atl. 1060. In that case the Court said:

> "• • • It is not because a conveyance or gift is made to a husband and wife as joint tenants that the estate by the entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and, since in the contemplation of the common law they are but one person, and can only take, not by moieties, but entirety. • • •"

The Court, in *Brewer* v. *Bowersox*, supra, pointed out that the marital relation gives rise to the peculiar estate of tenancy by the entirety when a conveyance is made to husband and wife and that they hold "as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife".

The Court below relied on *Brell* v. *Brell*, 143 Md. 443, 122 Atl. 635 (App., infra, p. 3, R. 153). In that case the husband and wife owned a small farm in Maryland, which was sold for about $5,800. The buyer paid down $1,800 to the husband and gave a mortgage to the husband and wife for $4,000. The wife released the mortgage to her husband on his promise that the money would be invested or deposited in a bank under their joint names. The husband bought property under his own name and kept the income. The wife brought suit for her share of the money.

The Maryland Court of Appeals held that the wife was not entitled to her half of a sum of money paid out to the son, of the parties involved, in payment for a loan. The Court also held that the wife was not entitled to a return of any of the money spent by the husband for living costs. The Court so held because the wife *had agreed*

to the payment to the son and the spending of the money for living costs. The Court held, however, that the wife was entitled to half of the balance of the monies invested by the husband. The Court further held that a trustee should be appointed to take charge of the property and pay over one-half of the income to the wife and one-half to the husband, the corpus to be paid over to the survivor upon the death of either party.

It is most respectfully submitted that the *Brell* case sustains the position of the petitioners here and not the respondent. Although the husband controlled the property in the *Brell* case, the Maryland Court of Appeals (citing *Masterman* v. *Masterman*, supra) held that the wife was entitled to half the income therefrom with the exception of the payment to the son and the monies paid for living costs to which payments the wife had agreed.

It is not clear upon what evidence the Court of Appeals relied in concluding that there was a clear agreement, followed by long continued practice, that the income from the tenancy by entirety properties should be considered in all respects that of the husband. (App., infra, p. 3, R. 153).

Apparently the Court relied upon the element of control and management by the husband which has been discussed hereinabove. Clearly under Maryland law there is no obligation on the part of the wife to pay her husband a commission for collecting her rentals or to compensate him for his labor or business acumen as alluded to by the Court below (App. p. 3, R. 154) and the Court cites no authority for such a proposition.

The Court relied in part on the testimony of Lipsitz for it said (App., infra, p. 4, R. 154):

* * * *

"Further, Lipsitz again and again testified that he considered this income as his own. For example, in response to a question, he stated: 'It didn't belong to me, it belonged to my wife. *It is mine just the same.*' (Italics ours.) • • •"

• • • •

The language used by Lipsitz, quoted above, simply expresses the layman's view of the law and does not show any agreement between husband and wife. It is a coincidence that his expression was similar to language used in the books and quoted by this Court in *Poe* v. *Seaborn*, supra, as follows:

• • • •

"The books are full of expressions such as 'the personal property is just as much hers as his' (Marston v. Rue, 92 Wash. 129, 159 P. 111, 112): 'her property right in it (an automobile) is as great as his' (ID. 92 Wash. 133, 159 P. 111, 113); 'the title of one spouse therein was a legal title, as well as that of the other' (Mabie v. Whittaker, 10 Wash. 663, 39 P. 172, 175).

That the wife did not agree that the income belonged to her husband but in fact shared control thereof is further shown by testimony of record. Lipsitz testified as follows (R. 57):

"Q Well, now, is that money, that $3500, Mr. Lipsitz invested substantially in ground rents, or were there some other investments? A No, ground rent. She wouldn't let me invest in nothing else except ground rent."

He further testified (R. 55):

"Q How much cash did you have, if you know of your own knowledge, at the end of 1941? A In 1941, the money didn't belong to me, it belonged to my wife from the sale of the ice station, 672 West Franklin Street, corner of Pine, and that was her share for an investment at that time, $10,000, she kept it in the vault, and later she invested in ground rent."

The Court of Appeals also relied in part on a discussion between the Tax Court and counsel for petitioners for it said:

> "• • • In colloquy between counsel for Lipsitz and the Court this interchange occurred:
> 'The Court: 'Now do I understand both parties to agree that the assets of both these Petitioners may be considered together?'
> 'Mr. Luce: 'Yes, your Honor; and it is the way the net worth statements have been set up.' (App., infra, p. 4, R. 154).

The above colloquy between Court and counsel does not support the proposition that there was a clear agreement between the husband and wife that the income from the properties should be considered in all respects that of the husband.

It is perfectly true that, in the net worth statements, the assets of both the husband and wife, the tenancy by entirety properties, were included by all parties to the proceeding. This has to be so because the properties were held as tenants by the entirety. We respectfully suggest, however, that inclusion of the properties held as tenants by entirety in the net worth statements does not create a situation whereby the law of Maryland can be changed to tax all the income from these properties to the husband as his sole income.

Also it must be remembered that all parties agree that for the years 1942 and 1943 Lipsitz and his wife filed joint returns and jointly reported the income. (App., infra, p. 1, R. 3).

There is no evidence of record that Mrs. Lipsitz either agreed or impliedly agreed that the income from the property was that of her husband. The Court below apparently relied upon statements made in the brief for the Commissioner of Internal Revenue for such a finding is not supported in any sense by the record.

This case stands alone in taxing to the husband all the income from property held in Maryland by a husband and wife as tenants by the entireties. The other decided cases and rulings hold that the income from such properties owned in Maryland is taxable in equal shares to the husband and the wife.

Elsie S. Bour v. *Commissioner,* 23 T.C. No. 35, November 17, 1954.

George E. Saulsbury v. *Commissioner,* 27 B.T.A. 744, citing *Poe* v. *Seaborn,* supra.

I.T. 1670, June, 1923, Internal Revenue Cumulative Bulletin II-1, January-June, 1923, p. 146 (Internal Revenue Ruling).

Prentice-Hall "Federal Taxes" 1955 Edition, Volume I, Paragraph 7211, at page 7170.

The decision of the Court below is also in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Commissioner* v. *Hart,* 76 F. (2d) 864, affirming 27 B.T.A. 528. This case interprets the laws of the State of Michigan with respect to the taxation of property owned by husband and wife in that state.

We respectfully submit that the Married Women's Acts of Maryland have created sacred rights for the protection of wives and their interests in property which cannot be lightly set aside. We think that a right in real property cannot be relinquished by the wife except by written agreement. Otherwise, any so-called understanding would be in violation of the Statute of Frauds. Here, we submit, there was neither a written nor oral agreement between the spouses and the wife's right cannot be set aside by implication. In Maryland, a judgment against the husband is neither good against property owned by the wife and husband in the entireties nor is a lien against

the husband valid upon property held by the husband and wife as tenants by the entireties. *Masterman* v. *Masterman,* supra; *Brewer* v. *Bowersox,* supra.

Congress has made the operation of the tax law, in such a case as this one, wholly dependent upon State law and the law of the State of Maryland must be given conclusive effect in determining ownership and Federal tax liability based thereon. *Immaculata Gallagher* v. *Smith,* and cases cited therein, (CA 3, June 3, 1955), Paragraph 9485, Commerce Clearing House Federal Tax Service, 1955.

II.

The Court below erred in sustaining the opinion and decision of the Tax Court by failing to apply the principles applicable to net worth cases laid down by this Court in *Holland* v. *United States,* 348 U.S. 121 and *Smith* v. *United States,* 348 U.S. 147.

As developed herein above, the net worth determination of income by the Tax Court taxes to petitioner Morris Lipsitz for the years 1938, 1939, 1940, 1941 and 1944 the individual tenancy by the entirety income of his wife, Helen Lipsitz. The result is a distorted net worth computation which penalizes the petitioner Morris Lipsitz by including income and property belonging to his wife and thus reaches an erroneous determination of the petitioner's net worth at the beginning and close of each year.

In *Holland* v. *United States,* supra, and *Smith* v. *United States,* supra, this Court pointed out the "importance of accuracy" in determining a computation of income by the net worth basis.

In two very recent decisions, the Sixth and Eighth Circuits applied the principles enunciated by this Court to

civil tax decisions of the Tax Court based on net worth computations.

In *Anthony* v. *Thomas et al.* v. *Commissioner* (June 14, 1955) Paragraph 72,773, Prentice-Hall Federal Taxes 1955, The United States Court of Appeals for the Sixth Circuit said:

• • • •

"By contrast, the four net worth cases recently considered by the Supreme Court, and many of the net worth decisions of the lower federal courts cited by petitioners, were criminal cases, where the presumption was in favor of the taxpayers, and the Government had the obligation of establishing their guilt beyond a reasonable doubt. *Holland* v. *United States,* 348 U.S.121 (1954); *Friedberg* v. *United States,* 348 U.S. 142 (1954); *Smith* v. *United States,* 348 U.S. 147 (1954); *United States* v. *Calderon,* 348 U.S. 160 (1954).

"Yet, although the petitioners here had the burden of proving that the Commissioner's determination were wrong, if they did so, it was not incumbent upon them to prove that they owed no tax, or what was the tax that they did owe. *Taylor* v. *Commissioner,* 70 F. (2d) 619, 621 (2 Cir., 1934), affirmed, 293 U.S. 507 (1935). '(W)here it is apparent from the record that the Commissioner's determination is arbitrary and excessive, the taxpayer is not required to establish the correct amount that lawfully might be charged against him, and he is not required to pay a tax that he obviously does not owe. In proceedings before the Tax Court, as distinguished from suits for refund in the District Court, it is sufficient to show that the Commissioner's determination is invalid. Upon such a showing the case should be remanded to the Tax Court for further hearings on the point involved.' *Durkee* v. *Commissioner,* 162 F. (2d) 184, 187 (6 Cir., 1947). See *Boston & M. R.R.* v. *Commissioner,* 206 F. (2d) 617, 626 (1 Cir., 1953)."

• • • •

The Court, in the *Thomas* case, found that the decision of the Tax Court was inaccurate and reversed and remanded the case for the taking of further evidence and a finding of petitioners' cash on hand at the commencement and termination of each of the tax years involved.

The United States Court of Appeals for the Eighth Circuit reached a similar conclusion in *Anthony Marcella and Bessie Marcella* v. *Commissioner* and reversed the Tax Court (June 1, 1955), Paragraph 72,743, Prentice-Hall Federal Taxes, 1955.

We respectfully submit that the decision of the Court below is in conflict with the decisions of the Sixth and Eighth Circuits named above and violates the guiding instruction of this Court in *Holland* v. *United States,* supra, and *Smith* v. *United States,* supra, which, we respectfully submit, are applicable to civil as well as criminal cases.

In the instant case, respondent's agent Carney admitted that he failed to give the petitioners credit at the crucial beginning point for at least three valuable properties.

Respondent's agent testified as follows (Minutes of Hearing 887-8):

"By Mr. Luce:

* * * *

"Q Have you given the taxpayer credit for any costs at all on 1324 Whatcoat Street in your net worth statement? You have not, have you, anywhere?

"A It appears not, Mr. Luce.

"Q How about 1335 Whatcoat Street? Have you given the taxpayer credit for either cost or improvements on that property?

* * * *

"The Witness: No, sir.

"By Mr. Luce:

"Q What about 1371 Whatcoat? Did you give the taxpayer any credit for that property as to cost or improvements?

"A No, sir."

The findings of the Tax Court sustained by the Court below gives no credit at the crucial beginning period for the ownership of these properties. As was said by this Court in *Holland* v. *United States,* supra:

> "* * * The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

We respectfully submit that the Commissioner's determinations in this case were arbitrary and excessive, substantially based upon taxing in a net worth statement the wife's income and property interests to the husband and omitting valuable properties owned at the crucial beginning period.

Thus the position of the respondent, Commissioner, in this case becomes untenable because it is admitted by all parties concerned that Helen Lipsitz was the owner, under State law, of half of the property here involved. The record shows no investigation of her income, no transfer of the properties by her to her husband and no income tax determined against her except for the years 1942, 1943 and 1945 when joint returns were filed reporting the income from the properties. Under the law of the State of Maryland she was the owner of one-half of the properties here involved; hence her contribution or interest in the assets was used by respondent to increase the husband's net worth which, under the erroneous decisions of the Courts below, became the individual separate income of the petitioner Morris Lipsitz.

We respectfully submit that the decision of the Court below should be reversed. *Taylor* v. *Commissioner,* 70 F. (2d) 619, 621 (CA 2, 1934), affirmed 293 U.S. 507 (1935); *Marcella* v. *Commissioner,* supra; and *Thomas et al.* v. *Commissioner,* supra.

Congress has made the operation of the tax law, in such a case as this one, wholly dependent upon State law and the law of the State of Maryland must be given con-

clusive effect in determining ownership and Federal tax liability based thereon. *Immaculata Gallagher* v. *Smith* and cases cited therein (CA 3) June 3, 1955, Paragraph 9485, Commerce Clearing House Federal Tax Service, 1955.

The Tax Court itself found, after the introduction of evidence by petitioners, that the beginning net worth of the petitioners as of December 31, 1937 amounted to $169,949.85 as compared to $84,033.59, as determined by the Commissioner. Thus, it is apparent that the Commissioner's original determination was arbitrary and excessive and under these circumstances the petitioners were not required to establish the correct amount that might be charged against them. It was sufficient for the petitioners to show that the respondent's determination was invalid. *Taylor* v. *Commissioner,* supra; *Thomas* v. *Commissioner,* supra; *Durkee* v. *Commissioner,* 162 F. (2d) 184, 187 (CA 6, 1947).

The Court below erred by failing to remand the case to the Tax Court for the correction of the errors outlined hereinabove. *Taylor* v. *Commissioner,* supra, *Thomas* v. *Commissioner,* supra, *Durkee* v. *Commissioner,* supra.

III.

It is respectfully submitted that the Court below erred by sustaining the Tax Court in disregarding the unrebutted testimony of petitioners' duly qualified expert witnesses as to the fair market value of the assets of Warner Ice Company as of June 30, 1937. It was essential to find the fair market value of said assets at that given date to determine the gain or loss upon the sale of the Warner Ice Company by petitioners during the year 1941. (Opinion of the Court of Appeals, App., infra, p. 5, R. 155).

The Tax Court simply made a finding that assets of Warner Ice Company as of June 30, 1937 "had a fair market value of $36,000". It did not explain how such a value was reached. The only evidence offered as to fair

market value at the basic date was that of petitioners. The Tax Court merely reached an "independent conclusion of its own", disregarding all of petitioners' evidence.

We think that the decision of the Court of Appeals, approving the determination of the Tax Court, is contrary to well settled law and in conflict with the following decisions of the Eighth, Sixth, Third, Ninth, First and Second Circuits and the Court of Appeals for the District of Columbia, as developed herein as follows:

"It Is Reversible Error for the Tax Court to Disregard Competent, Relevant Testimony When It Is Uncontradicted."

The above heading is quoted from the opinion of the Court of Appeals for the Eighth Circuit in *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583, and is a rule which is well established by the decisions of the United States Courts of Appeal. It is the duty of the Board of Tax Appeals, now Tax Court, to decide a case in accordance with the proof before it and it is error to fail to consider the unrebutted evidence of a taxpayer. *Rookwood Pottery Co.* v. *Commissioner*, (C.A. 6) 45 F. (2d) 43.

It is reversible error for the Tax Court to disregard competent, relevant and material evidence introduced by a taxpayer and to reach "an independent conclusion of its own". *Boggs & Buell* v. *Commissioner*, 23 F. (2d) 859; *Pittsburgh Hotel Co.* v. *Commissioner*, 43 F. (2d) 859; *Pittsburgh Hotel Co.* v. *Commissioner*, 43 F. (2d) 345 and *Nichols* v. *Commissioner*, 44 F. (2d) 157. (Decisions of the Third Circuit.) The rule has been applied in other circuits in the following cases: *Belridge Oil Co.* v. *Commissioner* (C.A. 9), 85 F. (2d) 762; *Citrus Soap Co.* v. *Commissioner* (C.A. 9), 42 F. (2d) 372; *Buena Vista Land & Dev. Co.* v. *Lucas* (C.A. 9), 41 F. (2d) 131; *Royal Packing Co.* v. *Commissioner* (C.A. 9), 22 F. (2d) 536; *Conrad & Co.* v. *Commissioner* (C.A. 1), 50 F. (2d) 576; *Bowitt*

Teller & Co. v. *Commissioner* (C.A. 2), 53 F. (2d) 381; *Pflegher Hardware Specialty* v. *Blair* (C.A. 2), 30 F. (2d) 10; *Planters Operating Co.* v. *Commissioner* (C.A. 8), 55 F. (2d) 583; *Dempster Mill Mfg. Co.* v. *Burnet* (Ct. of App., D.C.), 46 F. (2d) 604.

In *Nichols* v. *Commissioner,* supra, the Court summarized the testimony and stated:

> "This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence, and this he did not do nor attempt to do, and accordingly his determination cannot stand. United States v. Rindskopf, 105 U.S. 418, 26 L. Ed. 1131; Thompson Pottery v. Routzahn, (D. C.), 25 F. (2d) 897; Flannery v. Willcuts (C.C.A.) 25 F. (2d) 951; Briggs Manufacturing Co. v. United States (D.C.), 30 F. (2d) 962.
>
> "The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence, and therefore its redetermination is set aside, the determination of the Commissioner reversed, and the income tax returns of the petitioner approved."

Petitioners' experts testified in open court and their testimony was admitted in evidence. Respondent did not offer any testimony to rebut the evidence of petitioner's witnesses as to the fair market value of the Warner Ice Company as of June 30, 1937.

The lowest fair market value for the plant and machinery of the corporation as given by petitioners' experts was $75,000.

The following witnesses qualified as experts and testified specifically as to the fair market value of petitioners' ice plant at Cross Street as of June 30, 1937.

The expert witness Burgee, official Appraiser for the City of Baltimore, testified that the ground and improvements (the building) at 423-425 Cross Street had a fair market value of $30,000 in fee simple (R. 81).

The expert witness Allen Kenny, Superintendent of

Manufacturing for the American Ice Company, testified that the fair market value of the plant at Cross Street as of 1937 would be $75,000 (R. 88).

The expert witness Hanneman, of Waltham Welding Works, Baltimore, Maryland, testified that he made a test in 1937 to determine the capacity of petitioners' ice plant at Cross Street; that a five day test at five different temperatures was made and that the plant had a ninety ton per day capacity (R. 79). The witness testified that the fair market value of the plant as of June 30, 1937, based upon the capacity of ninety tons per day, was $78,000 (R. 79).

The testimony of Mr. Hanneman was based not only upon his expert knowledge but on personal knowledge due to the fact that he had tested the plant in 1937.

Both Hanneman and Kenny testified as to the fair market value of the entire plant (buildings and machinery) as a going concern. Burgee testified as to the fee simple fair market value of the ground and building. The Tax Court allowed only $36,000 as the fair market value, less than half of the value testified to by the experts, and only $6,000 in excess of the value of the ground and building thereon in fee simple as testified to by Burgee.

In this case we have a situation where the Tax Court finds a fair market value of $36,000 for the assets of Warner Ice Company as of June, 1937 without explaining how it reached such a value and with no evidence in the case to support such a value.

It seems clear from the record why the respondent introduced no evidence whatever as to the fair market value of the Warner Ice Company assets as of June, 1937. The Commissioner erroneously determined that the proper basis for determining gain or loss was the cost of these assets; not their fair market value as of June, 1937. The Tax Court, however, reversed the position of the Commissioner as a matter of law and held that the fair market value of the Warner Ice Company assets as

of June, 1937 was the correct basis for determining gain or loss rather than the cost of these assets. The Tax Court said (R., p. 28):

• • • •

> "Moreover, in connection with the assets formerly in the hands of the Warner Ice Manufacturing Corporation, it must be remembered that the corporation was liquidated on July 1, 1937. That liquidation was a taxable transaction and the assets thereupon took on a *new* basis, namely, their then market value." (Emphasis supplied.)

• • • •

We most respectfully submit that the sanction by the Court of Appeals of the Tax Court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

CONCLUSION

Petitioners respectfully submit that this Honorable Court should grant the petition for a writ of certiorari

Respectfully submitted,

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CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE

WALTER H. MALONEY.